

January 11, 2011

Mr. Charlie Hoppin  
Chair, State Water Resources Control Board  
c/o Ms. Jeanine Townsend, Clerk to the Board  
Post Office Box 100  
Sacramento, California 95812-0100

VIA E-MAIL  
commentletters@waterboards.ca.gov

Re: **Comment Letter – 1/18/2011 Board Workshop: Woods CDO**

Dear Chairman Hoppin and Members of the Board:

The Northern California Water Association (NCWA) appreciates the opportunity to comment on the draft Cease and Desist Order (Draft CDO) concerning threatened unauthorized diversions by Wood Irrigation Company (Woods). NCWA is an association of water suppliers throughout the Sacramento Valley, whose diversions supply over 2,000,000 acres of farms and much of the habitat for birds using the Pacific Flyway. NCWA is committed to advance the economic, social, and environmental sustainability of the Sacramento Valley by enhancing and preserving its water rights, supplies, and water quality for the rich mosaic of farmlands, cities and rural communities, refuges and managed wetlands, and meandering rivers that support fisheries and wildlife. Importantly, NCWA members have pre-1914 water rights that are among the oldest in California, which is integral to the Sacramento Valley's self-sufficiency in water supplies for all these various purposes.

NCWA fully supports the SWRCB's efforts to obtain accurate and complete information on water diversions throughout California. NCWA supported those provisions in the 2009 water legislative package, which includes the requirements that all riparian and pre-1914 water users fully and accurately report their water diversions and use.<sup>1</sup> NCWA also supports the SWRCB's efforts to prevent the unauthorized diversion and use of water and believes that vigorous action should be taken against those who divert water without any basis of right.

Without commenting on the merits of the Draft CDO or on the validity of the rights at issue, NCWA is concerned that the Draft CDO can be interpreted in a way that would indicate the SWRCB is attempting to implement the comprehensive regulatory

<sup>1</sup> While pre-1914 and riparian water users had been required, prior to the 2009 water legislation, to file Statements of Diversion and Use, those statements were for information purposes only and there was no legal consequence for the failure to file a statement.

authority it has over permits and licenses on pre-1914 and riparian water rights. In this regard, NCWA is requesting clarification of the Draft CDO.

*The Draft CDO Appears to Apply Only to Water Diverted in Excess of Woods' Recognized Pre-1914 Water Rights*

The introductory paragraph of the Order in the Draft CDO provides:

IT IS HEREBY ORDERED THAT pursuant to sections 1831 through 1836 of the Water Code, within 60 days Woods shall cease and desist from diverting water in excess of 77.7 cfs at any time, unless and until compliance with the following is accepted and approved by the Deputy Director for Water Rights.

This language indicates that the Draft CDO prohibits and regulates only the diversion and use of water in excess of the 77.7 cfs of recognized pre-1914 appropriative water rights. The remainder of the conditions in the order appears to apply only to water in excess of Woods' recognized pre-1914 rights. If the intent of the Draft CDO is to target only diversions in excess of Woods' recognized pre-1914 rights, clarifying language should be added to remove any confusion, and prevent any unintended consequences through future interpretations of any final order issued. We recommend the following as a replacement for the introductory paragraph in the order:

IT IS HEREBY ORDERED THAT pursuant to sections 1831 through 1836 of the Water Code, within 60 days Woods shall cease and desist from diverting water in excess of 77.7 cfs. If Woods seeks to divert any water in excess of 77.7 cfs, Woods must first comply with the conditions set forth below. These conditions only apply to water diverted in excess of 77.7 cfs.

If, however, the intent of the Draft CDO is to condition and regulate Woods' exercise of its recognized pre-1914 appropriative rights, NCWA believes such conditions would represent an unprecedented attempt to extend the SWRCB's expansive authority in issuing water-right permits to pre-1914 and riparian rights.

NCWA believes that, while the draft order's discussion of the authority of the SWRCB to conduct an investigation and make a preliminary determination of pre-1914 and riparian rights to prevent the unauthorized diversion and use of water is reasonable and supported by law, any terms that the draft order would impose on Woods' recognized pre-1914 appropriative water rights would represent an inappropriate exercise of regulatory authority over such rights. The SWRCB should revise those proposed terms so they are more closely aligned with the SWRCB's interest in preventing illegal diversions.

*While the SWRCB has the Authority to Prohibit the Unauthorized Diversion or Use of Water, that Authority does not include the Authority to Otherwise Regulate Pre-1914 Water Rights*

As explained above, NCWA fully supports the SWRCB's effort to ensure that people who divert water from rivers and streams do so pursuant to valid water rights. NCWA also supports appropriate enforcement to prevent the unauthorized diversion or use of water. However, NCWA does not support any attempted assertion of regulatory authority that the SWRCB exercises in issuing permits to pre-1914 water rights through the use of Cease and Desist Orders.

The SWRCB's authority for Cease and Desist Orders is found in Water Code Section 1831. There, the SWRCB is given the authority to issue Cease and Desist Orders "in response to a violation or threatened violation of . . . [t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division." (Water Code section 1831(d).) Importantly, that same statute also expressly provides that this article [Article 1 of Chapter 12] "shall not authorize the board to regulate *in any manner*, the diversion or use of water *not otherwise subject to regulation* of the board under this part [Part 2 of Division 2, Appropriation of Water]. (Water Code section 1831(e), emphasis added.) In other words, while the SWRCB can issue orders prohibiting the unauthorized diversion and use of water, even as it relates to asserted pre-1914 water rights, the SWRCB cannot, using the words of the statute, *in any manner*, regulate the exercise of the underlying right. The Draft CDO attempts to do what Section 1831(e) expressly prohibits.

If applied to the Woods' exercise of its recognized pre-1914 rights, the conditions contained in the Draft CDO would exceed the SWRCB's authority over pre-1914 rights because they would regulate the exercise of Woods' underlying pre-1914 rights rather than just ensuring that Woods has water rights sufficient to authorize its diversions. In particular:

- Proposed condition 2 would require Woods to obtain the SWRCB's approval before delivering water to a water user that asserts a water right beyond the rights described in the draft order; and
- Proposed condition 3 would require Woods to prepare, and obtain the SWRCB's approval of, a monitoring plan that would be required to include: (1) provisions to monitor the monthly amounts and rates of water delivered to its customers; and (2) implementation of an additional method to track individual customers' water use, such as "the installation of meters at all points of delivery to water users."

Again, these proposed conditions would represent unprecedented and unauthorized SWRCB regulation of the use of water diverted under recognized pre-1914 rights, directly contrary to the express prohibition contained in Water Code section

1831(e). This expansion of authority is not necessary to accomplish the SWRCB's appropriate objective of ensuring that Woods holds valid appropriative water rights.

The SWRCB's authority for attaching conditions to the diversion and use of water is contained in Water Code section 1253. There, the Legislature provided the SWRCB with the authority to allow for the appropriation of water [in the Water Code] "under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." (Water Code section 1253.) This authority does not extend to pre-1914 or riparian water rights.

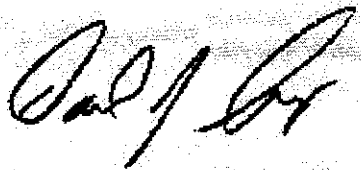
Both pre-1914 and riparian diverters are required to complete and file annual Statements of Diversion and Use with the SWRCB. (Water Code section 5101.) There, the Legislature provided for the specific monitoring and reporting requirements. As such, Woods will be required to comply with Water Code section 5101's mandate, and, in doing so, provide the information set forth in Water Code section 5103. These statutorily mandated reporting requirements should provide sufficient information to determine whether Woods is complying with any Cease and Desist Order ultimately issued.<sup>2</sup>

*Conclusion*

NCWA appreciates the opportunity to comment on the Draft CDO. In sum, Condition No's 2 and 3, if applied to Woods' recognized pre-1914 water rights, represent an inappropriate expansion of the SWRCB's regulation of such rights and should therefore be deleted.

Very truly yours,

NORTHERN CALIFORNIA WATER ASSOCIATION



By: \_\_\_\_\_  
David J. Guy  
President

<sup>2</sup> The Water Code also provides for additional substantial penalties for intentional and material misstatements in Statements of Diversion and Use. (Water Code section 5107.)